



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Scholarly Works

Faculty Scholarship

6-1-1974

The Rescripts of the Emperor Probus (276-282 A.D.)

Alan Watson

University of Georgia School of Law, wawatson@uga.edu



Repository Citation

Alan Watson, *The Rescripts of the Emperor Probus (276-282 A.D.)* (1974),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/265

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#)
For more information, please contact tstriepe@uga.edu.

THE RESCRIPTS OF THE EMPEROR PROBUS (276-282 A.D.)

ALAN WATSON*

Scholars tend to date the onset of the "post-classical period" of Roman law to 235 A.D., the year when the Emperor Alexander Severus was murdered by his troops. The line of great jurists had just about come to an end—Ulpian had been murdered by the mutinous Praetorians in 223—and for the next fifty years, until the accession of Diocletian, the Empire was in a state of chaos.

The post-classical period itself divides neatly into eras: early post-classical (or epiclassic as F. Wieacker suggests¹), Diocletianic, Constantinian, and so on, right up to the time of Justinian. One thing these eras have in common is relative neglect by modern legal historians. Yet, they have a charm and fascination of their own. The charm is that, for the first time in Roman law, we have primarily to study texts that we know concerned real people and real situations; the sources, almost entirely imperial rescripts,² reflect the immediate practical concerns of the addressees, not the interests of the jurists. The fascination lies not only in observing the changes in legal institutions as people react to new social, political, economic, and religious pressures, but, above all, in tracing the growth of state interference with personal relations and dealings. A change takes place that has suggestive parallels with Britain and elsewhere in the 19th and 20th centuries.

In an earlier study,³ I examined the private law in the rescripts of Carus and his two sons, the Emperors who ruled from 282 to 284, immediately before the accession of Diocletian, and found as the main conclusion that, despite everything, the quality of legal decision had remained reasonably high. This paper considers the four rescripts that survive from the troubled reign of the preceding Emperor, Probus. Probus was pushed to the fore by Syria and Egypt in 276 after the murder by his troops (or death induced by threats) of the Emperor Tacitus, and he outmanoeuvred Florianus, who was favoured by the rest of the Empire. Probus was accepted as Emperor when Florianus was put to death by his own soldiers

* Professor of Civil Law, University of Edinburgh. M.A. 1954, LL.B. 1957, University of Glasgow; M.A. 1958, D. Phil. 1960, D.C.L. 1973, University of Oxford.

¹ Wieacker, *Le Droit romain de la Mort d'Alexandre Sévère à l'Avènement de Dioclétien (235-284 apr. J.-C.)*, 49 *Revue Historique de Droit français et étranger* 201, 223 (1971). That article is mainly devoted to an examination of the rescripts of Gordian (238-244).

² For Egypt one must add the papyri.

³ Watson, *Private Law in the Rescripts of Carus, Carinus and Numerianus*, 41 *Tijdschrift voor Rechtsgeschiedenis* 19 (1973).

in the autumn of that year. After a reign marked by much fighting against internal and external enemies, Probus was—inevitably it seems—killed by his own men in 282.

Surprisingly, through all the chaos in the half century after 235, the imperial chancellery continued its work.

The first rescript of Probus, addressed to a man named Fortunatus, has survived without a date.

C. 5.4.9. Si vicinis vel aliis scientibus uxorem liberorum procreandorum causa domi habuisti et ex eo matrimonio filia suscepta est, quamvis neque nuptiales tabulae neque ad natam filiam pertinentes factae sunt, non ideo minus veritas matrimonii aut susceptae filiae suam habet potestatem.

If, with the knowledge of neighbours or other persons, you had at home a wife for the sake of procreating children, and from that marriage a daughter was recognised by you, then although no relevant documents were drawn up for the marriage or for the birth of your daughter, none the less the truth about your marriage or the daughter you recognised has its full validity.

This is one of numerous post-classical rescripts on marriage, and is primarily concerned with the very existence of and evidence for the marriage of Fortunatus. The text tells us that no written document was drawn up attesting the marriage, and while we are left in no doubt that such a document was legally unnecessary, it is evident that such documents were common. Fortunatus' worries as to the validity of his marriage and the status of his daughter are obviously caused by the non-existence of documents. It also emerges that at this time, as in classical law, no religious or civil ceremony was needed to mark the wedding; from the silence of the text we might even deduce—with only slight hesitation—that there had been no ceremony since otherwise it would have provided valuable evidence of the parties' intentions. What was important⁴ in classical law and later for the beginning of marriage was that the woman be taken to the man's home,⁵ and there is some indication of this in the word *domi*, "at home." Yet, though this taking home was of great significance, it was not sufficient to distinguish marriage from concubinage. The former also required *affectus maritalis*, the intention to be married. The chancellery emphasises this requirement by declaring that if Fortunatus had a wife with the intention of procreating children, then the union was marriage.

⁴ At least where the wedding was *inter absentes*, the *deductio in domum* was essential. Another early post-classical rescript, from the reign of Aurelian, C. 5.3.6, shows that where, as usual, the wedding was *inter praesentes*, marriage was considered to begin when the bride was in the bridegroom's house.

⁵ Cf., e.g., P. Corbett, *The Roman Law of Marriage* 95 (1930).

This phrasing is reasonable and in no way unfavourable since Fortunatus wishes the union—from which he has a daughter—to be recognised as marriage.⁶

More interesting is the question of evidence. Something more than the unsupported statement of the man is wanted, yet there is no document and apparently no ceremony. Knowledge of neighbours or other people of how the parties regarded themselves is sufficient for the purpose. It is the mental attitude behind decisions of this kind that opens the way to the much later (and non-Roman) constitution of marriage “by habit and repute.”

Fortunatus is also concerned about the status of the daughter whom he had accepted as his. Again, her status had not been recorded in a document,⁷ but he is given reassurance.⁸

To judge from the tense *habuisti*, “you had a wife at home,” Fortunatus’ wife is dead. In this case it is most likely that Fortunatus will have wanted the marriage to be established to avoid some of the disabilities that were imposed on the unmarried and childless.⁹

There is nothing surprising in the legal decision—no derogation from classical standards, no post-classical innovation. Most striking is the rescript’s banality. Why should anyone need an imperial rescript on this point? Indeed, how could anyone at that period enter a marriage with no ceremony or celebration, no formalities or writing? If the bride had brought the bridegroom a dowry, the amount, terms, and conditions must also have been unrecorded in writing. The answer can only be that Fortunatus, although a Roman citizen, was of the lowlier classes. Legal advice at the highest level was not restricted to the rich and powerful.

A second rescript dates from 280 and is addressed to a woman Massicia.

⁶ Interestingly, in the Republic the censors took an oath from certain citizens at least that they would have a wife for the sake of procreating children. Aulus Gellius, *Noctes Atticae* 4.3.2., 17.21.44.

⁷ For a discussion of these documents see F. Lanfranchi, *Ricerche sul valore giuridico delle dichiarazioni di nascita in diritto romano* (1951).

⁸ S. Solazzi considers there are interpolations in the rescript, and above all that there was no reference to a daughter or to other people, apart from neighbours, being aware of the existence of the marriage. Solazzi, *Pater est quem nuptiae demonstrant*, 7 *IURA* 131, 136 (1956). But he seems over-critical. He feels that the cancellery would not have written “*aut susceptae filiae*” but “*et susceptae filiae*” if her status had been in question. But the use of “*aut*” seems perfectly natural. And he seems to take “*vel aliis*” as referring to malicious persons, gossips and such like. But if *alii* are called upon, it is people who know the situation and who can testify to the *existence* of the marriage.

⁹ See, e.g., W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 292 *et seq.* (3d ed. P. Stein 1963).

C. 8.53.4. Si functiones per eum, cui donata res non erat, vel ab actoribus ipsius nomine celebratae sunt, tibi obesse non potest.

If the taxes on a thing were paid by a person to whom the thing had not been given, or by agents acting in his name, this fact can not cause you harm.

The rescript also appears in the *Fragmenta Vaticana* 288, which reveals that originally it was considerably longer. Sadly, *Fr. Vat.* 288 itself is in a very fragmentary state and cannot be reconstructed with any degree of certainty,¹⁰ but it does fill in the background. It appears that Massicia had intended to make a gift—quite possibly there was even a document relating the gift¹¹—but the gift was never completed, and she remained owner of the thing in question. The “donee” either personally or through his agents paid the taxes (*functiones*) on the thing in his own name and Probus reassures Massicia that this act is not prejudicial to her.¹²

In this instance too, there is little to be said about the law in the case. As in classical law, so in this rescript, there was no complete gift until the donor transferred the thing by physical delivery.¹³ Until the gift was complete, he or she had a perfect legal right to change his mind. Likewise, a non-owner did not become owner (or affect the real owner’s title) by acting as if he were the owner.

But the text falls neatly into the post-classical social scene in two ways. First, the rescript is one of several—the third rescript of Probus is another—that concern a gift where the donor changed his mind, either before the gift was complete or, too late, after the gift had been made.¹⁴ The whole topic of gift, in fact, has an unexpected prominence in the post-classical sources. Indeed, in what is in effect the preamble to his famous constitution of 316 A.D.

¹⁰ For very different reconstructions see 2 J. Baviera, *Fontes Iuris Romani Antejustiniani* 526 (2d ed. 1964); P. Girard & F. Senn, *Textes de droit romain* 533 (7th ed. 1967); E. Huschke, *Iurisprudentiae Auteiustinianae quae supersunt* 798 (5th ed. 1886). In the sixth edition of Huschke, most of the gaps in the text are left unreconstructed. 2 E. Huschke, *Iurisprudentiae Auteiustinianae quae supersunt* 304 (6th ed. E. Seckel & B. Kübler 1927).

¹¹ The text is too fragmentary for us to establish the rôle of this document. C. 8.53.1, which is dated 210 A.D., allows transfer of ownership by delivery of a document without a corresponding delivery of the thing, but the almost universal opinion of modern scholars is that this rescript, as it stands, cannot give the law of that period (or even of Justinian). Cf., e.g., 2 M. Kaser, *Das römische Privatrecht* 203, n.68 (1959); E. Levy, *West Roman Vulgar Law* 146-48 (1951).

¹² S. Riccobono regards the rescript in C. 8.53.(54).4 as interpolated by Justinian and would delete the “non.” Riccobono, *Traditio ficta*, 33 *Zeitschrift der Savigny Stiftung* 259, 290-92 (1912).

¹³ Or bound himself by a contract such as *stipulatio*.

¹⁴ There seem to be six further instances of “repentance” before Diocletian: C. 5.16.11, 8.55(56).1, 8.55(56).2, 8.55(56).3, 9.34.2; *Fr. Vat.* 272.

reforming the law of gift, the Emperor Constantine declares he has investigated many actions arising from gifts, and he enumerates as one of the causes of the disputes, incomplete gifts being taken as perfected, "*inchoata pro perfectis . . . controversiam faciant.*"¹⁵ Secondly, as is the case with many rescripts, the addressee is a woman. It would appear that they had as much right as men to approach the Emperor for a legal opinion, and that many were fully active in looking after their interests.

The third rescript, from the year 277, is addressed to one Felix.

C. 8.55(56).2. Si apud provinciae praesidem aviam filiae tuae quasi paenitentia ductam subtracta instrumenta donationum igni exussisse constiterit, vereri te non oportet, ne id, quod iure vires acceperat, ex post facto possit in dubium revocari.

If it was established in front of the provincial governor that the grandmother of your daughter, guided by a change of heart as it were, took back the documents of gifts and burned them, you need not fear that what had achieved legal efficacy can be rendered doubtful by subsequent conduct.

The basic point of the rescript is plain: a validly made gift cannot be revoked by subsequent behaviour of a donor who has changed his mind. In all probability the rescript has been shortened: a gift of a physical thing to be complete required that there be delivery of the thing. Nothing is said about delivery in the rescript as it stands, and it is reasonable to think that some reference to delivery has been cut out for the sake of brevity. The point, however, is not very material.

What is important, though, is what the rescript reveals about the mistaken views of non-lawyers on the state of the law. A gift required no writing and, indeed, writing had no role to play in the substantive law. (In practice, however, a written document might serve as some evidence that a gift had been made, though the sources stress that a document, even one filed with a public office, did not mean there was a gift unless delivery had occurred.¹⁶ Certainly, however, the document would reveal the donor's intention to make a gift.) Yet, here we have a grandmother who had made gifts tearing up the relevant documents obviously with the intention to revoke. Presumably, she was under the impression that the documents were important for the efficacy of the gifts.

¹⁵ Fr. Vat. 249. The constitution is repeated (with alterations) in C. Th. 8.12.1 and C. 8.53.25, but in these versions the preamble has been excised.

¹⁶ Cf., e.g., Fr. Vat. 263, 266a, 268, 285, 297; D. 41.2.48 (Papinian *10 resp.*), 6.1.77 (Ulpian *17 ad ed.*).

The fourth rescript is addressed to Octavianus in 278.

C. 2.16(17).1. Saepe rescriptum est ante sententiam signa rebus, quas aliquis [*alius*—MommSEN] tenebat, imprimi non oportere. et ideo ea rebus aut fructibus apud te constitutis illicite imposita poteris ipse licite detrahere, ut amotis his causa, quae ex officio tibi infertur, terminetur.

It has often been laid down by rescript that, before a legal decision, it is not proper to set seals on things which another person was holding. Hence when seals were illegally placed on things or their fruits which had been placed in your keeping, you can lawfully remove the seals, so that when they have been removed, the action which is brought against you by public officials may come to an end.

This is one of only two rescripts in the title of the Code, 2.16(17), concerned with the proposition that no one, without the authority of a judge, should place seals on things that another person has under his control. The other rescript is rather later, from the reign of Diocletian. The opening clause of our rescript, however, shows that it was by no means the first on the subject.¹⁷

The precise situation confronting Octavianus cannot be wholly reconstructed. It is possibly safe to assume that the rescript in its present guise has been rather generalised to give it wider applicability. However that may be, the general situation is plain. Octavianus had been given custody of property of which he was not owner.¹⁸ Another person—probably the owner or someone who claimed real rights over the property—set his seal upon the objects in question, although Octavianus claims that he had no judicial decision to support this behaviour. Exactly what real right was being claimed by this party cannot be established since the act of sealing did not amount to a claim of any particular title.¹⁹ In any event, the effect of the presence of the seals on the property was to make it appear that Octavianus had no right to physical custody, and public officials then brought an action against Octavianus, presumably to make him give up control. Octavianus asked the Emperor for a ruling and was, of course, told that since the seals had been affixed unlawfully he could simply remove them, and this would bring the official action against him to an end.

¹⁷ It was common for a rescript to claim support from the fact that the same proposition had also been laid down in earlier rescripts.

¹⁸ This appears from the use of the word "*constitutis*," which would be oddly used if Octavianus had control of property which he owned.

¹⁹ Thus, in C. 2.16(17).2 it is envisaged that the person who sets his seal improperly on property held by another might be the owner or the pledge creditor. For other instances of sealing see the texts referred to in the entries *signo* and *signum* in 5 *Vocabularium Iurisprudentiae Romanae* 543 *et seq.* (1939).

The purpose behind the legal rule is to avoid self-help: a person who believes he has a legal right to a thing must not take steps to assert his control until he has a judgement in his favour. Rulings of such kind are prominent at all periods of Roman law. Of great interest is the reason Octavianus wishes the rescript, namely to bring to a close a certain mode of conduct by state officials. Examination of post-classical rescripts shows this to be a very common purpose, whether or not it is alleged that the conduct of the officials is improper.

These, then, are the surviving rescripts of the Emperor Probus. None contains a great legal innovation; none shows a drastic lowering of legal standards. Their importance lies in what they reveal about general matters. Despite the enormous military and economic problems of the age, the imperial chancellery functioned; rescripts were issued to the most ordinary individuals, men and women alike. There was no need for a rescript to be concerned with an important principle or difficult point of law. Whereas the classical jurists write as if they were concerned only with law at Rome itself, the rescripts show the practical realities: one of them, C. 8.55 (56).2, with its mention of the *provinciae praeses* was obviously addressed to a person in a province, and it is probable that others, even all of them, were too. What is possibly most revealing of all is that every one of them is saying in effect that "lawyers' formalities" are not conclusive or are not effective in law, that truth is to prevail over writing or acts.²⁰

²⁰ I am grateful to Professor A.M. Honoré for his comments on a draft of this paper. Honoré's own paper on the making and authorship of early post-classical rescripts, which will appear in *3 Aufstieg und Niedergang der römischen Welt* (H. Temporini ed.), will be fundamental for all future research.